

services reflects an understanding that parties are least likely to resolve this issue without third-party assistance, that compulsory arbitration is reserved primarily for this purpose, and that the considerable public and private resources invested in arbitrating agreement provisions would be squandered if compensation-related issues were left unresolved.¹⁴

Similarly, in *BellSouth Telecomms., Inc. v. Cinergy Communs. Co.*,¹⁵ the United States District Court for the Eastern District of Kentucky found no violation of Section 252(b) when the Kentucky PSC decided a matter "directly related" to an open issue, but not specifically identified in a petition for arbitration. In that case respondent BellSouth claimed that petitioner Cinergy had failed to raise BellSouth's obligation to continue to provide DSL service over UNE-P lines. Cinergy responded that the Telecommunications Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. The PSC determined that the DSL issue was "directly related" to a line-splitting issue that Cinergy raised in its original petition, and that both Parties had addressed this issue at later points in the proceeding. Therefore, the PSC determined that the issue of DSL over UNE-P was properly before the Commission. The federal court agreed and found no violation of Section 252(b).¹⁶

Finally, in *Universal Telecom, Inc. v. The Oregon Public Utility Commission*,¹⁷ the federal court found that the Oregon PUC was entitled to reach the permissibility of offering the VNXX services that Universal was providing, even though neither Universal (a CLEC) nor Qwest (an ILEC) had raised that question in the arbitration petition or response thereto. (The parties had limited their pleadings to what intercarrier compensation rate, if any,

¹⁴ *Id.* at 1000.

¹⁵ 297 F. Supp. 2d 946 (2003).

¹⁶ *Id.* at 953.

¹⁷ Civ. No. 06-6222-HO (U.S. Dist. Ct. for the Dist. of Or.) (hereinafter *Universal*).

should apply to VNXX traffic directed to ISPs.) The court found that the Oregon PUC properly reached the issue of the legality of VNXX services in the course of considering two issues identified by Universal in its response to the petition for arbitration: whether Universal must pay for facilities on Qwest's side of the POI, and whether each party shall receive reciprocal compensation on all traffic.¹⁸ The court reasoned that a state commission can always reach an issue in arbitration that relates to the lawfulness of a service.

The facts and these federal court decisions demonstrate that CenturyTel's "subtle abstraction" is incorrect as a matter of fact and conclusion law. Charter never accepted CenturyTel's proposed rate level. Further, if a party raises a rate application issue in interconnection negotiations, it is also raising a rate level issue. Finally, to the extent that a party raises rate application, rate level – because it is "directly related" – is also before the state commission as an open issue. For all these reasons, the Arbitrator must reject CenturyTel's Motion to Strike Mr. Gates' rebuttal testimony.

Further Conclusions and Discussion

The Parties disagree as to the definition of a NID. Charter's definition more closely follows the current FCC definition for a NID, and the FCC's underlying technical rationale for its NID definition. Although CenturyTel believes it is necessary to include in the NID definition the concepts of "Point of Demarcation" and "End User Customer's Inside Wire," along with a reference to FCC Rule 68.105, the Arbitrator concludes it is not.

¹⁸ Order at 6 (Nov. 15, 2007).

In its *UNE Remand Order*, the FCC modified its definition of the loop network element to replace the phrase "network interface device" with "demarcation point."¹⁹ The FCC no longer considers the phrase "network interface device" appropriate for the purposes of describing the legal rights and responsibilities of interconnecting carriers at the point where the incumbent LEC and customer meet:

We find the demarcation point preferable to the NID in defining the termination point of the loop because, in some cases, the NID does not mark the end of the incumbent's control of the loop facility.²⁰

Indeed, the FCC specifically *declined* to include "inside wiring" in its definition of NID, noting that to do so limited CLECs' access rights:

Although competitors may choose to access the inside wire via the NID, in some circumstances they may choose to access the inside wire at another point, such as the minimum point of entry. By continuing to identify the NID as an independent unbundled network element, we underscore the need for the competitive LEC to have flexibility in choosing where best to access the loop.²¹

What CenturyTel asks the Arbitrator to do, in essence, is to ignore the FCC's admonition regarding using a NID definition to limit or condition CLEC access rights to the NID. Were the Parties in disagreement about "demarcation point" or "minimum point of entry," or the scope of FCC rules governing these concepts, CenturyTel's proposed definition might prove beneficial. However, the Parties disagree only as to the definition of NID, which the FCC clearly has limited.

¹⁹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ¶ 168, n. 304 (1999) (hereinafter "UNE Remand Order").

²⁰ *Id.* at ¶ 168.

²¹ *Id.* at ¶ 235.

Decision

Consistent with the FCC's rules, the Arbitrator finds that a NID is any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.²² Charter's proposed definition is consistent with this FCC definition, while CenturyTel's proposed definition introduces legal or regulatory concepts that might be used to limit or condition a CLEC's right to access that NID.

The Arbitrator finds this issue in favor of Charter.

NID Compensation

Conclusions of Law and Discussion

Charter argues it should be allowed to access the customer side of the NID for the purpose of connecting its own loop facilities to the customer's inside wire. According to Charter, such access does not constitute "use" of the NID as a UNE, and does not create any obligation for Charter to pay CenturyTel.²³ CenturyTel counters that where Charter elects to place its loop facilities in CenturyTel's NID, it must compensate CenturyTel for that "use." CenturyTel argues that Charter has no right to "use" CenturyTel's NIDs without compensation.²⁴

The FCC does not define the term "use" with respect to NID access. It is unclear what "feature, function or capability" CenturyTel believes Charter "uses" when accessing the customer side of the NID. The evidence demonstrates that, to the extent Charter

²² 47 C.F.R. § 51.319(b)(1).

²³ DPL at 88.

²⁴ Id. at 90.

accesses a CenturyTel NID for the purpose of connecting its facilities to the inside wiring of an end user customer (what Charter's witness Mr. Blair characterized as a "Star Wiring" scenario)²⁵, Charter typically opens the protective covering of the NID to reach the customer side. Then, after disconnecting CenturyTel's loop facility from the end user's inside wiring (often by disconnecting a cross-connect wire) either (i) attaches its own facilities to a clamp or terminal on the customer side of the NID, which clamp or terminal is connected to the inside wiring emanating from the end user customer's premise, or (ii) splices and encapsulates (known as "scotchlocking") its own facilities directly to the end user's inside wiring.²⁶

In both cases, the Charter connection remains entirely within portions of the NID that are completely and at all times accessible to the premises owner. In no case would Charter formally request a NID UNE from CenturyTel, nor is CenturyTel required to engage in any back office activity or field activity.

It is important to note that all of Charter's activities take place on the customer side of the "demarcation point,"²⁷ which, according to FCC Rule 68.105(a) and in the context of a standard CenturyTel NID, means the jack into which CenturyTel's RJ11 connector (or cross-connect wire) is plugged.²⁸ "Carrier-installed facilities at, or *constituting, the demarcation point shall consist of wire or a jack.*"²⁹ CenturyTel's "communications facilities" – that is, its network – end at the point of its RJ11 connector, *i.e.*, the end of its "local loop,"

²⁵ Ex. 7, p. 12, Diagram 3.

²⁶ Ex. 7, pp. 10-11; Tr. 528, l. 2-10.

²⁷ 47 C.F.R. § 68.3 ("the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises").

²⁸ Ex. 7, p. 7, Diagram 1.

²⁹ 47 C.F.R. § 68.105(a).

or the facilities capable of transmitting communications.³⁰ The customer's inside wiring begins at that same RJ11 jack which, while "carrier-installed," constitutes the demarcation point according to FCC Rule 68.105(a). Charter's activities all take place on the customer side of the demarcation point, and thus such activities do not constitute access to the NID UNE.

CenturyTel attempts to confuse the issue by introducing the concept of "minimum point of entry" ("MPOE"). CenturyTel's objective, evidently, is to suggest that even on premises where it installed an NID with a standard RJ11 connector, it might nonetheless still assert control over the wiring on the customer side of that connector and running to (in effect) the last 12 inches of wiring before the wiring actually enters the wall of the premises.³¹ The MPOE is not relevant to this discussion, as the standard CenturyTel NID clearly serves to house the demarcation point. The significance of the fact that Charter's activities occur on the customer side of the demarcation point is that Charter is not actively or intentionally "using" any part of CenturyTel's "network" (any "network element") in the way it accesses the customer side of the NID.

The Arbitrator also finds that Charter is not obligated to pay CenturyTel a service order charge for accessing the customer side of the NID. There is simply no evidence of any back office or field activity performed by CenturyTel that would justify imposition of such a charge. When Charter accesses a CenturyTel NID, it is Charter, not CenturyTel,

³⁰ Of all the NID "functions" identified by Mr. Miller, none include the transmission of communications. Tr. 522, I. 23-25; Tr. 523, I. 1-17 (wherein Mr. Miller identifies a NID's purpose as (i) a connection device between the LEC's drop and the customer's inside wiring; (ii) protection from lightning strikes; (iii) a weatherproof housing; and (iv) a test device).

³¹ Tr. 591, I. 8-15.

which incurs costs.³² CenturyTel performs no independent service function to warrant imposition of any charge.

Decision

Consequently, Charter does not “use” CenturyTel’s NID as a UNE, and thus no compensation is required. Accordingly, Charter shall not be liable to CenturyTel for any NID-related charges, including any “service order” charges. Because Charter does not “use” CenturyTel’s NID, CenturyTel may not assess that or any rate for providing access to its NIDs. The Arbitrator adopts Charter’s language with respect to Issues 2 and 24.³³

The Arbitrator finds this issue in favor of Charter.

3(a). How should the Agreement define, and incorporate, provisions from the tariffs used by both parties?³⁴

Findings of Fact

4. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.³⁵

5. The Parties desire to incorporate portions of their tariffs into the Agreement.³⁶

³² Tr. 530, l. 11-12.

³³ CenturyTel raised in the DPL potential Issue 24(a), “(a) Should Article IX, Section 3.4 clarify that the End User controls Inside Wire except in those multi-tenant properties where CenturyTel owns and maintains such Inside Wire?” CenturyTel’s proposed language for Section 3.4 is unnecessary given the language of 47 C.F.R. § 51.319(b)(2).

³⁴ CenturyTel’s phrasing of this issue is: “(a) How should the Agreement define the term ‘tariff’? (b) How should the Tariffs be referenced and incorporated into the Agreement?”

³⁵ The Arbitrator takes administrative notice of this fact pursuant to 536.070(6) RSMo.

³⁶ Ex. 4, p. 6, l. 20-21, 23; p. 7, l. 1-4.

6. There are only eleven points in the Agreement that reference a tariff.³⁷

7. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes.³⁸

Conclusions of Law and Discussion

Charter's proposed language would include a definition of the term "tariff" that establishes that the Parties intend to incorporate only those provisions that are specifically and expressly identified in the Agreement. Unlike CenturyTel's proposal, which requires only a general reference to the complete tariff(s), Charter believes that the Agreement should not be construed as incorporating provisions that are not specifically identified by the Parties. The Arbitrator agrees.

Charter's proposal creates certainty between the Parties as to what tariff provisions are incorporated into the Agreement. This approach also ensures that only those specific provisions that both Parties mutually intend to incorporate from either Party's tariffs will be made a part of the Agreement. As Mr. Webber explained, Charter's proposal will minimize potential disputes between the Parties concerning obligations arising under the Agreement.³⁹ Indeed, Charter's proposal clarifies that no material contractual obligations of either Party can be increased, or reduced, through the application of a tariff in an overbroad manner.⁴⁰

Charter's proposal is consistent with applicable law. Specifically, Missouri courts have ruled that an extraneous document may constitute part of a contract "[s]o long as the

³⁷ Tr. 159, l. 3-5.

³⁸ Ex. 3, p. 13, l. 2-4.

³⁹ Ex. 3, p. 7, l. 3-6.

⁴⁰ *Id.* at 7, l. 8-11.

contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt.”⁴¹ That result is consistent with Charter’s language, which requires that any incorporated tariffs be “specifically and expressly identified in this Agreement”⁴²

Decision

Charter’s proposed language concerning Issue 3(a) is consistent with the Act and Missouri law. The language requires the incorporation of specific tariff terms, and therefore will ensure that any incorporated tariff is not applied in an overbroad manner. That, in turn, should help to limit disputes between the Parties concerning obligations arising under the Agreement. Accordingly, Charter’s proposed language will be adopted.

The Arbitrator finds this issue in favor of Charter.

3(b) / 41. How should specific tariffs be incorporated into the Agreement?

Findings of Fact

8. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.⁴³

9. The Parties desire to incorporate portions of their tariffs into the Agreement.⁴⁴

⁴¹ *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 196 (Mo.App. 2006) (citing RESTATEMENT (SECOND) OF CONTRACTS § 132 cmt. c. (1981)).

⁴² DPL at 5 (Charter proposed language, Art. II, § 2.140)

⁴³ The Arbitrator takes administrative notice of this fact pursuant to § 536.070(6) RSMo.

⁴⁴ Ex. 4, p. 6, l. 20-21; p. 7, l. 1-4.

10. There are only eleven points in the Agreement that reference a tariff.⁴⁵

11. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes.⁴⁶

Conclusions of Law and Discussion

CenturyTel proposes to incorporate portions of its existing tariffs into the Agreement as a basis for satisfying certain obligations it has under the Agreement.⁴⁷ CenturyTel's position is that merely referencing either Party's tariff in the Agreement is sufficient to incorporate all tariff terms into the Agreement.⁴⁸ Under CenturyTel's approach, an entire referenced tariff would be incorporated and made part of the Agreement.

While Charter does not object in principle to the concept of incorporating external documents for certain contractual obligations, it insists the Parties incorporate external documents with precision.⁴⁹ Charter's position is that only the specific tariff provisions the Parties intend to be bound by should be incorporated into the Agreement. Under Charter's proposal, the Agreement would include language clarifying that tariffs are not applicable under the Agreement except, and only to the extent that, the Agreement incorporates specific rates or terms from either Party's tariff.

⁴⁵ Tr. 159, l. 3-5.

⁴⁶ Ex. 3, p. 13, l. 2-4.

⁴⁷ Ex. 4, p. 6, l. 20-21.

⁴⁸ Ex. 3, p. 10, l. 23-25.

⁴⁹ Ex. 4, p. 6, l. 23; p. 7, l. 1-4.

Charter argues it would be unreasonable for it to agree that hundreds of additional pages of CenturyTel's tariffs are automatically incorporated into the Parties' Agreement.⁵⁰ The Arbitrator agrees.

CenturyTel's position appears to be at odds with Missouri law, which provides that an extraneous document may constitute part of a contract "[s]o long as the contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt."⁵¹ CenturyTel's approach would not make "clear reference". Mention of a single tariff provision could be leveraged into including other, superfluous tariff language not otherwise intended and/or mutually agreed upon by the Parties.

CenturyTel's proposal would make the Agreement less clear, more ambiguous, and more prone to future disputes that would need to be resolved by the Commission.⁵² Incorporating only the specific tariff provisions the Parties deem to be effective under the Agreement would ensure that the tariff is not applied in an overbroad manner.⁵³

The Commission recently rendered a decision to resolve an interconnection agreement dispute between Charter and CenturyTel.⁵⁴ That proceeding is particularly instructive because it involved the question of whether a CenturyTel tariff is incorporated into the current interconnection agreement between Charter and CenturyTel.

The Commission found that CenturyTel had knowingly assessed Local Number Portability ("LNP" or porting) charges upon Charter that were not authorized by the

⁵⁰ Tr. 7, l. 5-7.

⁵¹ See *supra* note 30.

⁵² Ex. 4, p. 13, l. 9-10.

⁵³ Ex. 3, p. 11, l. 14-16.

⁵⁴ Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC, Case No. LC-2008-0049, Report and Order at 5 (MO PSC 2008) (hereinafter Report and Order).

interconnection agreement and more significantly, rejected CenturyTel's attempts to incorporate certain tariff charges as a basis for assessing charges upon Charter.⁵⁵ Thus, Charter's desire to clarify the application and incorporation of specific tariff provisions into the Agreement is well-founded.

Further, the Arbitrator rejects CenturyTel's claims that Charter's proposal creates unnecessary complexity or would cause CenturyTel to waste its time parsing through tariff terms and conditions. CenturyTel's argument overlooks that the company will be referencing its own tariff, with which it is presumably knowledgeable. The Arbitrator also agrees with Mr. Webber there is nothing wasteful about specifically identifying which tariff provisions to incorporate into the Agreement to avoid confusion between the Parties, and overreaching by CenturyTel.⁵⁶

In addition, Mr. Webber explained that the Agreement is organized in a manner that would not make it unduly complicated for CenturyTel to specify which terms (including rates, terms and conditions) would be binding upon Charter.⁵⁷ Indeed, Charter has already identified the specific tariff provisions to be incorporated into the Agreement so there is no credible reason not to identify those terms specifically.⁵⁸

In addition, the Arbitrator also rejects CenturyTel's argument that the filed rate doctrine precludes Charter's proposal. Generally, the filed rate doctrine prohibits a utility

⁵⁵ *Id.* at 6, 10-11 (finding that "neither the Agreement, *nor the documents* to which the Agreement refers, provide for a charge for porting requests") (emphasis added).

⁵⁶ Ex. 3, p. 12, l. 14-16.

⁵⁷ *Id.* at 12, l. 20-22.

⁵⁸ *Id.* at 13, l. 1-2.

from offering services at rates, terms or conditions that vary from its tariff.⁵⁹ CenturyTel therefore presupposes that Charter's proposal requires CenturyTel to provide services at rates, terms or conditions that vary from CenturyTel's tariff.

The Arbitrator disagrees. Charter does not seek to change the meaning of the tariff or exercise control over it. Nor is it seeking to obtain services at rates or terms that vary from those offered in the tariff.⁶⁰ Thus, there is no evidence in the record to support CenturyTel's argument that the filed rate doctrine is implicated by Charter's proposed language.

Decision

Charter's proposed language will incorporate only those specific tariff provisions the Parties intend to be operative under the Agreement. The Arbitrator rejects CenturyTel's proposal to incorporate tariffs in their entirety, as such approach would lead to disputes between the Parties. Charter's language with respect to Issues 3(b) and 41 will be adopted.

The Arbitrator finds this issue in favor of Charter.

Article III – Terms and Conditions

Termination of Agreement

4(a). Should a Party be allowed to suspend performance under or terminate the Agreement when the other Party is in default, and the defaulting Party refuses to

⁵⁹ See, e.g., *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

⁶⁰ Ex. 4, p. 10, l. 19-23.

cure such default within thirty (30) days after receiving notice of such default? How should “default” be defined in the Agreement?

Findings of Fact

12. The language CenturyTel proposes for Article III, § 2.6, which includes the requirement of a default notice and a 30-day cure period, is consistent with similar provisions in other Section 251 interconnection agreements and commercial contracts.⁶¹

13. In contrast, Charter’s competing language would require the non-defaulting party to the Agreement to commence dispute resolution and potential Commission involvement, even if the defaulting party’s non-performance concerns undisputed charges.⁶²

14. Requiring a Commission proceeding to establish a default would allow a party to violate the Agreement with inadequate risk of enforcement by the non-defaulting party.⁶³

15. Such a requirement would also unfairly shift the burden of initiating a time-consuming and costly Commission proceeding to the non-defaulting party in order to obtain the right to terminate the Agreement.⁶⁴

Conclusions of Law and Discussion

Default provisions and termination or suspension of performance provisions attendant to default by a Party are common to commercial contracts, and the Parties have chosen to include such provisions in the Agreement. Charter’s proposed language would

⁶¹ Ex. 21, p. 22, l. 9 – p. 28, l. 21

⁶² *Id.* at 29, l. 12-19.

⁶³ *Id.* at 30, l. 18- p. 31, l. 2.

⁶⁴ *Id.*

require, in most instances, that the Commission find that a default exists as a condition precedent to the non-defaulting Party's right to terminate. In contrast, CenturyTel's proposed language requires notice and a 30-day cure period as a condition to the non-defaulting Party's right to terminate.

The Arbitrator concludes that it would be unreasonable for the Agreement to require that the Commission find that a default exists as a condition precedent to a Party's right to suspend performance or terminate the Agreement. Rather, the non-defaulting Party's giving written notice of the Default to the defaulting Party following which there is a 30-day cure period is sufficient.

Moreover, the record demonstrates that CenturyTel's policy is to provide a copy of any notice of default to the Commission.⁶⁵ Thus, the Commission will have actual notice of any potential default, and will be able to monitor the need for any action if and when such action is required.⁶⁶

Further, Charter's own account of the billing disputes that arose with CenturyTel affiliates in 2007 shows that after it receives a notice of default, it may ask the Commission to issue a "standstill" order pending the Commission's review.⁶⁷ At that point, the Commission would have the discretion to involve itself before the Agreement is terminated.

⁶⁵ Ex. 20, p. 13, l. 1 – p. 14, l. 22; Rebuttal Schedule PH-1.

⁶⁶ However, it is questionable whether such action will be required since CenturyTel's witness has stated that CenturyTel would not disrupt any traffic exchange capability of Charter's subscribers under the termination provisions, absent involvement of the Commission.

⁶⁷ Ex. 12, p. 5, l. 12- p. 7, l. 5.

Decision

CenturyTel's proposed language creates the proper incentive for the Parties to perform their respective obligations under the Agreement. It also provides appropriate tools for a non-defaulting party to enforce the Agreement without unnecessary Commission intervention. Thus, the Arbitrator finds that CenturyTel's proposed language for the Agreement to resolve Issue 4(a) should be and hereby is approved.

The Arbitrator finds this issue in favor of CenturyTel.

4(b). Should the Agreement include terms that allow one Party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?"⁶⁸

Findings of Fact

16. CenturyTel operates in multiple operating areas and service areas in Missouri.⁶⁹

Conclusions of Law and Discussion

Charter seeks to ensure that if CenturyTel sells operations in a specific operating area to another entity, the terms of the Agreement would continue in effect once the buyer/transferee assumes operations in that area. Charter has exerted considerable time, and expense, to negotiate and arbitrate the terms of this Agreement. Thus, the benefits of Charter's efforts should last for the duration of the Agreement.

⁶⁸ CenturyTel's phrasing of this issue is: "What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?"

⁶⁹ Ex. 11, p. 13, l. 18-20.

CenturyTel should not be permitted to undermine those efforts by selling a specific operating area, or a portion thereof, to another buyer/transferee entity without requiring that entity to assume the Agreement in its entirety. Without these pre-conditions in place, the new buyer/transferee could simply refuse to interconnect with Charter, or could leverage Charter to interconnect pursuant to unreasonable terms and conditions. Charter's proposal will ensure that this result is avoided.

CenturyTel has opted into a waiver of Missouri Revised Statutes Section 392.300. So, unlike other carriers operating in Missouri, CenturyTel is not subject to the Commission's oversight as it pertains to receiving approval for transfers of its assets.⁷⁰ Thus, absent the language proposed by Charter, there are no protections to ensure that there is service continuity for Charter's end users.

Decision

Charter's proposed language ensures that neither Party is able to terminate the Agreement as to a specific area, or portion thereof, without the third party buyer/transferee assuming the terms of the Agreement. Specifically, neither Party will be permitted to use Section 2.7 to terminate the contract and discontinue interconnection arrangements in certain locations without meeting certain preconditions. Thus, both Parties will remain connected to the public switched telephone network and each Party's respective subscribers' phone calls will continue to be delivered, and received, without interruption. Charter's language for Issue 4(b) will be adopted.

The Arbitrator finds this issue in favor of Charter.

⁷⁰ Tr. 595, l. 16-25; Tr. 596, l. 1-4. See also Notice of Election of CenturyTel of Missouri, LLC for Waiver of Commission Rules and Statutes Pursuant to Section 392.420, RSMo., Commission Case No. IE-2009-0079.

5. Should a Party's right to assign its rights and obligations under the Agreement, *without consent*, to a subsidiary or Affiliate be restricted to only those assignments made in conjunction with the sale of all or substantially all of the Party's assets?⁷¹

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

The Arbitrator accepts CenturyTel's proposal that a Party be allowed to make a total or partial assignment of the Agreement to a subsidiary or affiliate without the other Party's consent upon (1) notice to the other Party; (2) the subsidiary's or affiliate's assuming the Agreement's obligations, rights, and duties in writing; and (3) the other Party's reasonable satisfaction that the subsidiary, affiliate, or assigning Party can fulfill the assigned obligations. In doing so, the Arbitrator rejects Charter's proposed restriction on a Party's ability to partially or totally assign duties and interests under the Agreement to situations involving the sale of all, or substantially all, of a Party's assets.

Under both CenturyTel's and Charter's proposed language relating to assignment, a Party's right to assign in whole or in part without the other Party's written consent is limited (1) to assignments made to a subsidiary or Affiliate of the assignor; (2) to situations where the assignee assumes the rights, obligations, and duties of the assignor; (3) to situations where the other Party is "reasonably satisfied" that the assignee is able to fulfill the

⁷¹ Charter's phrasing of the issue is: "Should the Agreement allow either party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other party's consent?"

assignor's obligations; and (4) to situations where the other Party has first been given 90 days written notice. Charter provides no reason why a Party's right to assign rights, obligations, liabilities, and duties under this Agreement should be further limited to only the situation where a Party is closing its doors (*i.e.*, selling all or substantially all of its assets).

The general rule of law favors a party's right to assign duties and rights under a contract.⁷² Absent an express and valid contract prohibition, the *Restatement (Second) Contracts* § 317 indicates that contractual rights can generally be assigned unless (1) substituting an assignee's right for the assignor's right would materially change the obligor's duty, materially increase the obligor's risk, materially impair the obligor's chance of obtaining return performance, or materially reduce the value of return performance to the obligor or (2) an assignment is forbidden by statute or public policy. None of those concerns are at issue here.

Rather, in this situation, CenturyTel reasonably proposes that either Party be allowed to make a total or partial assignment of the Agreement to one of its subsidiaries or Affiliates without the other Party's consent upon the conditions identified above. The written consent of the non-assigning Party would be required in other situations. This language protects the non-assigning Party's rights and is not forbidden by either statute or public policy.

In contrast, Charter's proposed language adds an unnecessary layer of restriction. Under CenturyTel's proposed language, either Party's ability to assign without consent is limited to situations where the assignment is made to an Affiliate or subsidiary. This is not a situation where obligations are being assigned to a "stranger" of either CenturyTel or

⁷² RICHARD A. LORD, WILLISTON ON CONTRACTS § 74.22 (Westlaw database updated 2008).

Charter. In addition, Charter's proposed language unreasonably restricts CenturyTel's ability to utilize and advance its relationships with its Affiliates or subsidiaries. For these reasons, the Arbitrator rejects Charter's proposed language in Article II, § 5, which places an unnecessary restriction on the Parties' rights of assignment and adopts CenturyTel's language on this issue.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

7. Is Charter obligated to "represent and warrant" to CenturyTel the existence of its certification to operate in the State, or is it sufficient to simply state that such certification exists, with Charter providing proof upon CenturyTel's request?⁷³

Findings of Fact

17. Charter is certified in Missouri to provide local exchange and other related services to residents of Missouri.⁷⁴

18. There is no evidence in the record that Charter's Missouri certification will be forfeited or withdrawn during the term of the Agreement.

19. Charter has agreed to provide proof of Missouri certification upon CenturyTel's request.

⁷³ CenturyTel's phrasing of this issue is: "Should Charter be required to 'represent and warrant' to CenturyTel, or simply provide proof of certification, that it is a certified local provider of Telephone Exchange Service in the State?"

⁷⁴ The Arbitrator takes administrative notice of this fact pursuant to § 536.070(6) RSMo.

Conclusions of Law and Discussion

The dispute here concerns the extent to which a Party must provide guarantees to the other Party regarding a warranty as to its ongoing certification through the term of the Agreement. Although Charter did not file any testimony on this issue, its position is evident from the agreed-upon language in Article III, Section 8.4 of the draft Agreement.

Charter must obtain, and maintain, all necessary authorizations to obligate CenturyTel to perform under the Agreement. Charter agrees that CenturyTel has no obligation to perform under the Agreement until Charter has obtained FCC and Commission authorization(s).⁷⁵ Indeed, Charter has agreed to provide proof of certification to CenturyTel, in the form of a copy of its Certificate of Operating Authority, upon request.⁷⁶

CenturyTel, however, wants Charter to not only represent but also “warrant” that it is a certified local provider of Telephone Exchange Service in the State.” In support of its proposal, CenturyTel testified that it seeks to require Charter to meet, and “continue to meet” federal and state requirements for certification as a local exchange carrier.⁷⁷ Further, CenturyTel believes it necessary that Charter not only “represent and warrant” its current status as a certified local provider, but that Charter promise to “remain certified” for the “entire term of the Interconnection Agreement.”⁷⁸

CenturyTel is asking Charter to promise something that is beyond its control. This Commission, and other competent authorities, has the power to define, expand, reduce, or revoke the licenses granted to CLECs. The Commission, the FCC, or a court could issue a

⁷⁵ Agreement, Art. III, § 8.4.

⁷⁶ *Id.*

⁷⁷ Ex. 21, p. 38, l. 8-9.

⁷⁸ *Id.* at l. 13.

ruling that could bring Charter's status as a "certified local provider" into question, but not affect Charter's ability to perform up to the Agreement. Thus, the Arbitrator declines to require a competitive provider of local service to "warrant" that it will always maintain all necessary certifications.⁷⁹

Decision

Adopting the language proposed by Charter will not prejudice CenturyTel in any way. CenturyTel may request proof of Charter's certification at any time, and CenturyTel does not have to perform under the agreement if such certification does not exist. Charter's proposed language on this issue will be adopted.

The Arbitrator finds this issue in favor of Charter.

8(a). Should the *billed Party* be entitled to receive interest from the billing Party on amounts paid to the billing Party in error and which are later returned to the billed Party?⁸⁰

Findings of Fact

20. The Agreement should not contractually specify any interest to any refunds of overpayments that are later returned to the billed Party through the disputed billing process.

⁷⁹ Official notice is taken of a similar decision from Texas. *In re Petition of Sprint Communications Company, L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidated Communications of Fort Bend Company and Consolidated Communications Company of Texas*, Arbitration Award, PUC Docket No. 31577 at 44-45 (Texas PUC Dec., 2006)

⁸⁰ Charter's phrasing of this issue is: "(a) Should the bill payment terms related to interest on overpaid amounts be equitable? (b) Should the bill dispute provisions ensure that neither party can improperly terminate the agreement in a manner that could impair service to the public?"

21. Charter's proposal to apply an "identical interest rate" to underpayment and overpayments conflates two very different circumstances. One pertains to the billed Party's failure to timely pay "undisputed" bills (to which the Parties already have agreed to the specific late payment charges that will apply). The other pertains to a Party's recovery of "disputed" amounts (either underpayments or overpayments) through the disputed bill resolution process.⁸¹

22. Charter's proposal would provide Charter with the incentive to not review its bills or submit billing disputes on a timely basis.⁸²

23. Charter's proposal would provide Charter with the incentive to delay initiation of billing disputes for up to one year with the hope of recovering any overpayments with an inordinate amount of interest.⁸³

24. Even if interest should be paid on overpayments refunded to the billed Party, no such interest should apply for the period of time prior to the billed Party providing written notice to the billing Party of the billed Party's intent to dispute the alleged overpayments.⁸⁴

Conclusions of Law and Discussion

Like most issues in this arbitration, each Party claims that the other confused, misunderstood, or misstated its position on Issue 8(a).⁸⁵ In addition to reviewing the evidence filed by the Parties and their testimony at the hearing on the merits, the Arbitrator

⁸¹ Ex. 14, p. 8, l. 6-18, p. 10, l. 1-16.

⁸² *Id.* at 7, l. 5 – 8, l. 5.

⁸³ *Id.*

⁸⁴ *Id.*, at 8, l. 19 – 9, l. 18.

⁸⁵ See, e.g., Ex. 14, p. 7, l. 7-8; Ex. 12, p. 22, l. 16-17.

has carefully reviewed and considered the Parties' respective proposals and the entirety of Article III, § 9 as contained in each of the Parties' proposed Agreements.

The structure of Section 9, and the Parties' disputed language proposals within the context of that structure, are important to understanding the Parties' positions and, thus, the resolution of Issue 8(a). Therefore, in order to place the resolution of Issue 8 in context, a brief overview of the section is necessary.

Article III, § 9 contains three separate provisions that relate to this disputed issue - §§ 9.3, 9.4.1 and 9.4.2. Section 9.3 applies a "late payment charge" for the failure to pay *undisputed* amounts billed.⁸⁶ In contrast, Sections 9.4.1 and 9.4.2 both apply to billed amounts *disputed* by the billed party.

Section 9.4.1 permits the billed party to dispute billed amounts prior to the bill due date and to *withhold* payment of such amounts.⁸⁷ Section 9.4.2 permits the billed party to pay a bill entirely and then to *dispute already-paid amounts* up to one year after the initial bill date.⁸⁸ It is to Section 9.4.2 that Charter proposes to add the disputed language applying interest (at a rate commensurate with the amount of the late payment charge set forth in Section 9.3) to refunds of already-paid amounts that are later disputed and recovered pursuant to Section 9.4.2 and the billing dispute process.

⁸⁶ Article III, § 9.3 of CenturyTel's proposed Agreement; Article III, § 9.3 of Charter's proposed Agreement.

⁸⁷ *Id.*, Article III, § 9.4.1.

⁸⁸ *Id.*, Article III, § 9.4.2. With respect to Article III, § 9.4.2, Ms. Giaminetti testified: "What we're talking about here are *undisputed* overpayments." Ex. 12, p. 28, l. 22. However, the Arbitrator notes that Charter proposed its language applying interest rates to refunds in Section 9.4.2. As discussed above, that provision does not pertain to undisputed overpayments, but rather to overpayments *that are disputed* by the billed Party after they have been paid to the billing Party. (See Article III, § 9.4.2; Ex. 14, p. 10, l. 4-16.) Elsewhere in her testimony, Ms. Giaminetti acknowledges that the "overpayments" to which Charter seeks to apply an interest rate are, indeed, amounts disputed in a billing dispute. (See Ex. 12, p. 23, l. 5-7 ("It is clear from the language that Charter proposes for Section 9.4.2 that a billed party may request return of an overpayment, plus interest, *only after* a billing dispute has been 'resolved'.")).

While Charter asserts that it “only seeks the same opportunity for refunds of *overpayments*, at the same interest rate, that CenturyTel seeks for *underpayments*,”⁸⁹ that assertion is not entirely accurate. CenturyTel does not seek to apply an interest rate to *all* underpayments, but rather only to *undisputed* underpayments – charges that the billed Party *has not disputed* and to which Section 9.3 applies. Indeed, CenturyTel has not proposed to apply a contractually-specific interest rate (or late payment charge) to any underpayments that are the subject of a bona fide billing dispute under either Sections 9.4.1 (withheld amounts) or 9.4.2 (disputed amounts already paid).⁹⁰

Rather, CenturyTel would allow, pursuant to the Agreement’s terms, the process of negotiating or arbitrating the resolution of a disputed bill to determine, in a just and reasonable manner, any net payments and interest between the Parties. In contrast, Charter proposes to apply an explicit and specific interest rate whenever it recovers a refund of *disputed* charges in the course of a bill dispute proceeding.⁹¹ Thus, while the *amount* of the interest rate in Charter’s proposal may “mirror” the amount of the late payment charge found in Section 9.3, regarding undisputed amounts, the *circumstances* in which Charter proposes to apply that rate do not “mirror” each other.

Discerning the true differences between the Parties’ respective positions, however, does not address the issue as to whether the billed Party should be entitled to interest on

⁸⁹ Ex. 11, p. 22, l. 13-14 (emphasis added).

⁹⁰ Ms. Giaminetti testified: “If Charter overpays (including in the circumstance where Charter prevails in a billing dispute), Charter proposes to assess the identical interest rate to which CenturyTel is entitled for underpayment.” Ex. 11, p. 25, l. 13-16. However, based on the Arbitrator’s review and analysis of Article III, § 9 above, there is no evidence that CenturyTel is contractually entitled, under the already resolved terms of the Agreement, to interest on *all* underpayments or even any underpayments that are the subject of a bona fide billing dispute under Section 9.4. Nor has CenturyTel taken that position with respect to Issue 8(a). Thus, Ms. Giaminetti’s premise appears flawed.

⁹¹ See Joint Statement, 21.